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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

LFG NATIONAL CAPITAL, LLC,

Petitioner,

v.

THE SUPERIOR COURT OF THE CITY  
AND COUNTY OF SAN FRANCISCO,

Respondent;

JOSEPH M. ALIOTO et al.,

Real Parties in Interest.

A144441

(City and County of San Francisco  
Super. Ct. No. CGC-13-532569)

THE COURT:\*

Petitioner LFG National Capital, LLC (LFG) seeks writ relief from an order staying enforcement upon a money judgment in favor of petitioner and against real parties Joseph M. Alioto and the Alioto Law Firm (collectively Alioto), without requiring a bond pursuant to Code of Civil Procedure section 917.1, pending determination of Alioto's appeal of the judgment.<sup>1</sup> We have requested and received an informal opposition from Alioto and a reply by LFG. On March 9, 2015, we advised the parties we might proceed by issuing a peremptory writ in the first instance. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177–180.)

\* Before Ruvolo, P.J., Rivera, J. and Streeter, J.

<sup>1</sup> All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

We grant the petition by way of this memorandum opinion because “[t]he Courts of Appeal should dispose of causes that raise no substantial issues of law or fact by memorandum or other abbreviated form of opinion.” (Cal. Stds. Jud. Admin., § 8.1; see *People v. Garcia* (2002) 97 Cal.App.4th 847, 850–855.)

Section 917.1 requires an undertaking be made by a losing party to stay enforcement of a money judgment or trial court order pending appeal unless “the money to be paid is in the actual or constructive custody of the court . . . .”<sup>2</sup> The trial court entered judgment in favor of petitioner in the amount of approximately \$31 million (principal plus accrued costs and interest) on LFG’s contract action against Alioto based on a loan made by LFG to Alioto. The trial court stayed enforcement of the judgment under the statutory exception, on the ground that the federal district court was holding in escrow approximately \$34 million due Alioto in an unrelated case (an award of attorney’s fees) in a sum sufficient to cover the judgment entered (not including post-judgment interest, costs and attorney’s fees).

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<sup>2</sup> Section 917.1 provides in relevant part:

“(a) Unless an undertaking is given, the perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for any of the following: [¶] (1) Money or the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action. [¶] . . . [¶]

“(b) The undertaking shall be on condition that if the judgment or order or any part of it is affirmed or the appeal is withdrawn or dismissed, the party ordered to pay shall pay the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed, as entered after the receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs which may be awarded against the appellant on appeal. *This section shall not apply in cases where the money to be paid is in the actual or constructive custody of the court; and such cases shall be governed, instead, by the provisions of Section 917.2.* The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order. The liability on the undertaking may be enforced if the party ordered to pay does not make the payment within 30 days after the filing of the remittitur from the reviewing court.” (Italics added.)

### *Background*

In 2005, Law Finance Group (a finance lender licensed by California) entered a term loan and security agreement with Alioto, agreeing to lend some \$18 million dollars to the latter. The money was supplied by petitioner LFG, an unlicensed affiliate of Law Finance Group to whom Law Finance Group had assigned the contract. Alioto defaulted. In 2013, LFG attempted to interpose a claim on an award of attorney's fees to Alioto in an unrelated antitrust action. The attorneys fees in the federal action were recommended to be \$47 million. In April 2013, the federal court deferred action on the Alioto fee award, but ordered that a portion of the fee award "shall be set aside in a separate escrow account pending a determination of the validity and enforceability of the lien asserted by LFG . . . ."<sup>3</sup>

In July 2013, LFG sued Alioto in the San Francisco Superior Court. In August 2014, the superior court awarded summary judgment in favor of LFG in the sum of \$31 million (including interest and costs), rejecting Alioto's argument that LFG's lack of a California license precluded it from collecting interest on the loan under California's usury laws.

In October 2014, the federal district court (Illston, J.) ordered that \$34,178,238 of the fees it had awarded the Alioto firm would be retained "pending the entry of a final judgment by the San Francisco Superior Court."<sup>4</sup>

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<sup>3</sup> We take judicial notice of the relevant orders of the federal district court pursuant to Evidence Code section 452, subdivision (d).

<sup>4</sup> The district court order provided: "Additionally, \$34,178,238.00 million of Alioto's fee award shall be retained in the QSF account pending the entry of a final judgment by the San Francisco Superior Court in the litigation between LFG . . . and Alioto. Alioto and LFG shall notify the Court when the state superior court enters the final judgment. The Court ORDERS that prior to any disbursement of funds to LFG, Alioto shall have the opportunity to seek a stay of execution of the judgment pending appeal from the state court within 14 days of the entry of the final judgment. The parties shall promptly notify this Court of the disposition of any such stay request. If the state courts deny a stay of execution, the Court at that time will issue a separate order directing [the court-appointed claims administrator] to pay LFG in satisfaction of the judgment, and to pay Alioto any residual fees that may remain owing to him."

On January 5, 2015, the superior court entered an order staying enforcement of the judgment in the action “to the extent of my jurisdiction,” indicating its belief that the judgment was “fully secured” and stating it strongly believed the Court of Appeal should examine and decide “whether or not California Public Policy renders collection of interest by an unlicensed lender who didn’t originate the loan but did everything else . . . barred by the usury provision of our constitution.” On February 3, 2015, it entered a further order that “the stay issued on January 5, 2015, be extended for Alioto’s appeal without a bond or an undertaking pursuant to CCP §§ 917.1(b).” In an order of March 6, 2015, the court denied LFG’s ex parte application seeking to reverse the court’s earlier order granting the stay of enforcement without posting a bond.

On February 4, 2015, Alioto appealed the judgment. (*LFG National Capital, LLC v. Alioto et al.*, (A144346, app. pending).) LFG cross-appealed on February 24, 2015. On March 6, 2015, LFG filed the instant petition for writ of mandate or other relief seeking to overturn the trial court’s order refusing to require a bond as a condition of its staying enforcement of the judgment. At our request, Alioto filed opposition and LFG filed a reply.

#### *Discussion*

“The purpose of the undertaking requirement is ‘to protect the judgment won in the trial court from becoming uncollectible while the judgment is subjected to appellate review. [Citation.] A successful litigant will have an assured source of funds to meet the amount of the money judgment, costs and postjudgment interest after postponing enjoyment of a trial court victory.’ (*Grant v. Superior Court* (1990) 225 Cal.App.3d 929, 934 . . . .) In implementing this purpose, section 917.1 does not tailor the amount of the undertaking to the peculiarities of the judgment. To the contrary, it is rigidly formulaic: ‘The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order.’ (§ 917.1, subd. (b) . . . .)” (*Leung v. Verdugo Hills Hospital* (2008) 168 Cal.App.4th 205, 211–212 (*Leung*), italics omitted.)

A trial court lacks power to stay enforcement of the money judgment pending appeal without the undertaking required by section 917.1, unless the statutory exception applies. (See *Sharifpour v. Le* (2014) 223 Cal.App.4th 730, 733 [“section 917.1, subdivision (a)(1) requires the giving of an undertaking to stay enforcement” of a money judgment.].) Nor does it appear that the court had discretion to order an amount less than that set forth in the statute, absent the exception. (*Leung, supra*, 168 Cal.App.4th at p. 212.)

Alioto concedes the funds held in the federal district court are not in the actual custody of the San Francisco Superior Court. However, Alioto maintains that such funds are in the “*constructive custody*” of the superior court. Both the plain meaning of the statute and the legislative history of section 917.1, subdivision (b) indicate that “constructive custody” means that the superior court, even if it does not have physical custody of the sums, has “control” over the money. The term “custody” is defined as “[t]he care and *control* of a thing or person for inspection, preservation, or security.” (Black’s Law Dict. (10th ed. 2014) p. 467, italics added.)

The legislative history of section 917.1, subdivision (b) is consistent with the plain meaning that the money is in the “constructive custody” of the court when it is the custody of someone over whom the court has control, such as a *receiver*.<sup>5</sup>

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<sup>5</sup> At LFG’s request, we take judicial notice of various documents comprising the legislative history of the Legislature’s 1981 revision of section 917.1, subdivision (b). (Evid. Code, § 459, subd. (a).) The 1981 revision of section 917.1, subdivision (b) sought to address “the situation where parties both claim a sum of money, which sum is in the custody of the court *or a court-appointed receiver*. In such a situation, the court and receiver are bonded to the extent that the principal is already protected. What is needed is a bond to protect the prevailing party from loss of use, lost interest, and costs. To require the posting of an undertaking, including an amount already within the custody of the court or a receiver, would vastly exceed the scope of any possible loss, and seems grossly unfair since there is no risk of loss, at least of the principal amount. To the extent that the respondent may be injured by the loss of the money, another statute, CCP § 917.2, already affords the court discretion to fix an undertaking which will provide appropriate protection.” (Terrance Flanigan, Legis. Representative Cal. State Bar, letter to Gov. Edmund G. Brown, Jr., re Assem. Bill No. 1798 (1981–1982 Reg. Sess.) July 7, 1981, Governor’s chaptered bill files, ch. 196, italics added.) In such situation, a

It is conceded that the superior court has no control over the federal district court. (Civ. Code, § 3423, subd. (b) [“An injunction may not be granted [¶] . . . [¶] [t]o stay proceedings in a court of the United States.”]; *Donovan v. City of Dallas* (1964) 377 U.S. 408, 412–413.) Although Alioto refers to the “pledge” of the court not to release funds, Judge Illston’s order does not amount to a “pledge.” As argued by LFG, the district court stated its intent to hold the money in escrow until “entry of a final judgment by the San Francisco Superior Court in the litigation between LFG . . . and Alioto.” That final entry of judgment by the superior court has occurred. Assuming we were to agree with Alioto and the superior court that the federal district court had somehow bound itself not to distribute the money until the finality of an appeal in this court, that would still not satisfy the “constructive custody” requirement, as the superior court has absolutely no control over whether the federal district court releases some or all of the money. We agree with LFG that by treating funds in the custody of *another* court over which the superior court had no control as though they were in “the actual or constructive custody of [the judgment] court,” the trial court effectively rewrote section 917.1

Alioto’s fear that it will be unable to get the funds back from LFG should Alioto prevail on appeal is not grounds to ignore the statute here. Although LFG is an out-of-state entity, there is no indication that it would not be amenable to California process—particularly as it has invoked California jurisdiction as a party to litigation here and in the federal court. Further, to the extent Alioto should prevail on its usury defense, such victory would extend only to the interest, not the principal sum of the debt. Finally, the

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full bond or undertaking in the amount of at least one and one-half times the money judgment was unnecessary “since the principal is already protected because the court *and receiver* are bonded.” (Sen Com. on Judiciary, Rep. on Assem. Bill No. 1798 (1981–1982 Reg. Sess.) p. 2, italics added; see *id.* at pp. 1–2; see also Governor’s Office, Enrolled Bill Rep. on Assem. Bill No. 1798 (1981–1982 Reg. Sess.) July 13, 1981, Governor’s chaptered bill files, ch. 196, p. 3.)

purpose of the statute requires that any risk of nonpayment fall on the party losing in the trial court—Alioto.<sup>6</sup>

Let a peremptory writ of mandate issue directing respondent court to vacate the order of February 3, 2015, in superior court case number CGC-13-532569, entitled *LFG National Capital, LLC v. Alioto et al.* (Super. Ct. S.F. City and County, 2015, No. CGC-13-532569), ruling that the stay issued on January 5, 2015, be extended for Alioto's appeal without a bond or an undertaking pursuant to section 917.1, subdivision (b). The court is directed to enter a new and different order requiring a bond under section 917.1 as a condition of any stay.

LFG shall recover its costs in connection with bringing this petition. (Cal. Rules of Court, rule 8.493(a)(1)(A).)

This decision will become final 30 days after it is filed. (Cal. Rules of Court, rule 8.490(b)(2).)

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<sup>6</sup> Apparently recognizing the likelihood that the court erred in staying execution of the judgment without requiring Alioto to post an undertaking, Alioto seeks to achieve the same result by petitioning us to grant his petition for writ of supersedeas, staying execution of the judgment pending determination of the matter on appeal. (§ 923.) We have denied the supersedeas petition in a separate order.